

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Appropriate Framework for Broadband)	CC Docket No. 02 -33
Access to the Internet Over Wireline Facilities)	
)	
Universal Service Obligations of Broadband)	
Providers)	
)	
Computer III Further Remand Proceedings:)	CC Docket Nos. 95 -20, 98 -10
Bell Operating Company Provision of)	
Enhanced Services; 1998 Biennial Regulatory)	
Review – Review of Computer III and ONA)	
Safeguards and Requirements)	

**JOINT REPLY COMMENTS OF WORLD COM, INC., THE COMPETITIVE
TELECOMMUNICATIONS ASSOCIATION, AND THE ASSOCIATION FOR
LOCAL TELECOMMUNICATIONS SERVICES**

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INTRODUCTION AND EXECUTIVE SUMMARY

Virtually every participant in the telecommunications market opposes the Commission's proposals. Independent ISPs who would be put out of business were these conclusions adopted cannot understand why the Commission values their contributions so lightly. The states, who would be displaced from their traditional role as regulators of retail telecommunications services, wonder why the Commission has chosen to become the ILECs' supreme protector against state public service commission trying to open their local markets. Competitive local and long -distance carriers wonder why the Commission is so eager to unplug the bottleneck access lines that connect them to their customers. Vint Cerf, one of the creators of the Internet, has expressed his view that "the policy directions suggested by these proceedings could have a profoundly negative impact

ontheInternet,” andquestionswhytheFCCappears“toembraceafuturewhere,atbest, consumerscanonlyreceivewhatunregulatedmonopoliesand/or duopoliesarewillingto givethem.”¹Eventheotherfederalagenciesarekeepingtheirdistancefromthis proposal.The GSAurgestheFCCtocontinuingunbundlingrequirements that encompassawiderangeoftransmissionspeedsandtechnologies.²TheDepartmentof JusticeandtheFBIwarnofthedestructiveeffectthisproposalwillhaveonlaw enforcement.³TheSecretary ofDefenseofnationalsecurityreasonsopposesthe Commission’sabandonmentofTitleIIjurisdiction.⁴

Indeed,theoverwhelmingweightoftheevidencepresentedintheCommentsis thatthereisaproblem,butitis theoppositeoftheonethatmotivated theCommissionto issuethisnotice.Throughlackofenforcement,the *ComputerIII*⁵ ruleshavebeen ineffective,andasaresulttheILECsalreadyhavepressedtheirbottleneckadvantage ontothedownstreammarketforbroadbandISPservices,whichthey nowdominate.New rulesthatprohibitpriceandnon -pricediscriminationagainstindependentbroadbandISPs wouldbringgreatconsumerbenefits.Attheleast,reimpositionofthe *ComputerII*⁶ structuralseparationruleswouldbringwelcomerelieftothe market,andwouldrespond (albeitbelatedly)tothecourtofappealsremandorderinthe *ComputerIII* proceeding.

¹LetterfromVintCerftoDonaldEvansandMichaelPowell,May20,2002at3,5 (attachedhereto)(“CerfLetter”).

²TriennialproceedingCommentsati.

³CommentsofDepartmentofJusticeandFederalBureauofInvestigation.

⁴CommentsoftheSecretaryofDefense.

⁵ *InreAmendmentofSection64.702oftheCommission’sRulesandRegulations* ,104 F.C.C.2d958(1996).

⁶ *InreAmendmentofSection64.702oftheCommission’sRulesandRegulations* ,77 F.C.C.2d384(1980).

Only the ILECs continue to push in the other direction. They urge the Commission to “light a revolutionary fire”⁷ and burn down the regulatory structures that have supported the growth of the Internet, and the growth of competitive markets in customer premises equipment, information services, long-distance services, and, increasingly, local exchange services as well.

As this rhetoric suggests, the ILECs share our view that the changes proposed by the FCC are indeed radical, projecting far beyond mere categorization of broadband Internet access services. Specifically, they agree that the Commission’s proposal reaches beyond Internet access services to “any service that uses packet-switch or successor technology,”⁸ thereby encompassing narrowband as well as broadband services that use that technology, and to any facilities permitting transmission speed over 200 kbps, which includes virtually the entire ILEC transmission network of T1, DS3, and, of course, the entire fiber optic network.⁹ Nor is this proceeding in any sense limited to the regulatory treatment of information services, for, in Verizon’s view, through the simple expedient of “adding an information component to a telecommunications service, the entire service becomes an information service.”¹⁰ This proceeding is about “broadband”

⁷Verizon Comments at 4.

⁸Verizon Comments at 6. It is revealing that the one service that does *not* fall within Verizon’s definition of broadband is the Internet access service that is the nominal subject of this proceeding. For ADSL is not inherently a packet-switched service, and typically it does not include the capability of transmitting information that is greater than 200 Kbps in both directions.

⁹*Id.* Verizon asserts in a footnote that it would not include circuit-switched services within this definition, *id.*, but since the proposal here largely concerns access to *facilities*, not *services*, this is a meaningless limitation.

¹⁰Verizon Comments at 8. Verizon here adopts the FCC’s tentative conclusion that when an information service is added to a telecommunications service, the resulting

or“informationservices”tothesameextentthattheGreeks’ gifttotheTrojanswas abouthorses.

TheILECs’ commentsmerelyservetounderscorethewrongheadednessand illegalityoftheFCC’sproposals.Theoverwhelmingweightofthematerialssubmittedin thisproceedingestablishesthattheILECs’ claimsthatthelocalbottleneckhasbeen eliminatedis false,theirclaimthatbroadbandisdifferentthannarrowbandinany relevantrespectisfalse,theirclaimthatthereisaproblemwiththepaceofbroadband deploymentisfalse,andtheirclaimthatderegulatingutilitieswithmarketpowerwill foster innovationandspurdeploymentisfalseandcontrarytoacenturyofexperienceas wellasthe1996Act.

TherecentSupremeCourtdecisionin *VerizonCommunications,Inc.v.FCC* ¹¹, underscoreshelatterpoint –Congresshasspokenonthe policyissuesthe Commission raisesinthisproceeding,andtheCommission’sproposedpolicyofencouraging deploymentofbroadbandfacilitiesbyderegulatingtheILECsiscontrarytothepolicy directivesofthe1996Act,aswellasmanyofitsspecificprovisions.

TheNP RM,andtheILECs’ commentssupportingit,harkenbacktotheerawhen theBellSystemarguedthatmonopolyprovidersbestservethepublicinterest,andthat anyrisksinherentincompetitionwouldonlyservetoweakenthe monopolists’ incentives toinvestinthenetwork.Nationalpolicy,however,tookadifferentdirection.In1996,,

serviceiscontaminatedandshouldbetreatedexclusivelyasaninformationservice.Itis inpartthatconclusionthatextendsthereachofthisproceedingtoapplytovirtuallyall telecommunicationsservices.AstheJointCommentersstatedintheiropening comments,theCommissionshould *not* extenditscontaminationdoctrinetoapplyto monopolylocalexchangec arriers. See JointCommentsofWorldCometal.(“Opening Comments”)at70 -71.

¹¹122S.Ct.1646(2002)(*IUBII*) .

Congress addressed the last bastion of monopoly, and as the Supreme Court has concluded, decided “to reorganize markets by rendering regulated utilities’ monopolies vulnerable to interlopers.”¹² It required the FCC vigorously to promote this policy change by adopting rules “designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents’ property.”¹³ Congress was also specific about the means to accomplish this sea change. It required the FCC to mandate access to the ILECs’ bottleneck facilities, since absent such regulation “a company that owns a local exchange . . . would have an almost insurmountable competitive advantage.”¹⁴ Thus, Congress required the FCC aggressively to implement “a policy promoting lower lease prices for expensive facilities unlikely to be duplicated [to] reduce[] barriers to entry,”¹⁵ since “competition as to ‘unshared’ elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly -to-duplicate elements necessary to provide a desired service.”¹⁶

As the ILECs’ comments underscore, the FCC has commenced a proceeding whose tentative conclusions and policy justifications are in the teeth of this legislative mandate. Where Congress mandated aggressive regulation to open ILEC networks to “interlopers,” the FCC opines that “a minimal regulatory environment” best will

¹² *IUBII*, 122 S.Ct. at 1661.

¹³ *Id.*

¹⁴ *Id.* at 1662.

¹⁵ *Id.* at 1668 n.20.

¹⁶ *Id.* at 1672 n.27.

“promote[]investmentan dinnovation.”¹⁷WhereCongresshasconcludedthatpromoting competitionwillbestleadtothevigorousandefficientgrowthofthetelephonenetwork, theCommissionaskswheitherderegulationofthemonopolistsmightleadthem“to deploybroadbandnetworks moreexpeditiously.”¹⁸WhereCongressforbidthe Commissionfrombearingfromenforcingunbundlingrequirementsuntiltheyarefully implemented,theCommissionaskswheither“iftheCommissionweretocontinueto imposeunbundlingrequirementsonlyon incumbentLECsorBOCs,howwouldthis affecttheirincentivetocoincuedeployingnewandinnovativebroadbandinformation services?”¹⁹And,whereCongressimposedspecificcommoncarrierregulationsonthe ILECs’bottleneckfacilities,theCommissionpr oposeshatthenation’slast -mile bottleneckinfrastructurebeconsidered“privatecarriage”andnotsubjecttoregulationof anykind.²⁰

Because the overwhelming majority of the commenters agree in full with the points made in our opening comments, in the sereply comments we focus on the commentsoftheILECs,whostandvirtuallyaloneinsupportingtheCommission’s tentativeadoptionoftheirradicalproposals.Inparticular,inwhatfollowsweaddress firsttheILECs’assertionthattheydonotprovide broadband services over bottleneck facilities.Second,weaddresstheILECs’claimthattheCommission’sTitleIITELRIC rulesdiscouragethemfromconstructingnewbroadbandfacilities.Third,weaddress

¹⁷ *InreAppropriateFrameworkforBoardbandAcces stotheInternetOverWireline Facilities*,NoticeofProposedRulemaking,17F.C.C.R.3019,¶5(2002)(“ Notice”or “NPRM”).

¹⁸ *Id.*¶51

¹⁹ *Id.*¶52.

²⁰ *Id.*¶26.

their argument that it is both unlawful and bad policy to subject their broadband facilities to Title II regulation while cable broadband facilities are not subject to similar regulation. Finally, we show that there is barely any disagreement among commenters about the proper construction of the 1996 Act's definitional provisions and the requirements of section 251.

I. The ILECs' Claim That They Lack Market Power in Providing Broadband Services Is Entirely Without Merit.

No economist would dispute the claim made by the stable of ILEC economists in this proceeding, that "[i]n competitive markets, competition, not regulation, is the best mechanism for maximizing consumer welfare."²¹ Conversely, no reputable economist believes that consumer welfare is maximized by deregulating a carrier with market power over existing bottleneck facilities. Note even the ILECs argue that it makes sense to deregulate a monopolist's bottleneck facilities, or that it makes sense to deregulate those facilities based on the judgment that those facilities might become competitive sometime in the future.

The ILECs claim that the Commission's deregulatory proposal is sensible because they lack market power. Thus, the ILECs claim that "[b]ecause the predicate underlying the *Computer Inquiry* unbundling requirement – the existence of bottleneck facilities – does not apply to wireline broadband services, this requirement no longer serves any useful purpose in the context of these services."²² Similarly, they acknowledge that

²¹Statement of 43 Economists at 6.

²²SBCC Comments at 24; *see also, e.g.*, Qwest Comments at 23 (*Computer Inquiry* rules should be abandoned because ILECs lack market power).

carriers should be allowed to remove services from Title II regulation unilaterally by declining to tariff them only when they lack market power over these services. ²³

But the overwhelming weight of the record evidence before the Commission demonstrates beyond any fair dispute that the ILECs are wrong when they claim that “local telephone companies control no bottleneck facilities or other essential inputs.” ²⁴

Most consumers that use the ILECs’ last-mile connections have no other choice but to use ILEC facilities, or, in a minority of instances, only one other choice. The bottleneck nature of those transmission facilities does not change depending on the kind of the traffic that they carry, depending upon whether the traffic is carried over the high-frequency rather than the low-frequency portion of the copper loop, or depending upon the kind of modem attached to that loop.

Nor does throwing the word “broadband” into the mix change anything. Virtually every transmission line in the ILECs’ network is capable of providing services at “broadband” speeds, depending upon the electronic equipment attached to the line. Since the bottleneck is defined by the feasibility of duplicating the lines themselves, the speed at which content moves across those lines is irrelevant to the policy questions posed in the NPRM. No less an expert than Vint Cerf has urged that this “engineering training and instincts chafe at the notion that something we choose to call broadband is something wholly separate and apart from narrowband, or, indeed, from the underlying network that supports it.” ²⁵ The incumbents simply are not “new entrants” ²⁶ when it comes to these

²³ Verizon Comments at 12.

²⁴ Verizon Comments at 15.

²⁵ Cerf Letter at 3.

facilities. They provide last -mile connections to broadband customers over the same bottleneck copper and fiber facilities that they use to provide other telecommunications services.

Indeed, the line the FCC would draw between traditional narrowband voice services, which would be subject to the regulation the Congress imposed in the 1996 Act, and new broadband services, which would be unregulated, is a line that will soon be washed away by technological developments. Internet telephony is already commercially available, and in the foreseeable future all of the large carriers will be using “broadband” to provide the full range of telecommunications services. As SBC’s Chief Technology Officer reports, “[t]he technology is going in a direction that ultimately will have all services commingled. So whether the y’re data or digital or voice, ultimately I believe all those will be commingled.” ²⁷ The FCC’s proposal to limit the 1996 Act (and the application of historical common carriage principles) to certain network functions that will be obsolete in the foreseeable future is not legally sustainable.

The ILECs nevertheless insist that neither wholesale nor retail regulation of incumbents’ “broadband networks” is necessary because “broadband services” currently are being offered over multiple alternative platforms. ²⁸ On the residential side, the ILECs claim that wireline, cable, satellite and wireless provide four different last -mile connections to the home, and that for that reason there is no bottleneck. But their own “Broadband Fact Report” indicates that there are virtually no broadband services

²⁶ Verizon Comments at 15

²⁷ Telecommunications Report, June 17, 2002.

²⁸ SBC Comments at 22; Verizon Comments at 15.

currently delivered by wireless and satellite.²⁹ The assertion that something new might happen in the future that could break down the bottleneck provides no ground to treat the market as currently competitive. Moreover, as we stated in our opening comments, there are substantial problems inherent in both wireless and satellite broadband transmission services that explain the current lack of deployment and counsel against prediction of robust deployment in the future.³⁰

Their passing reference to wireless and satellite to one side, the ILECs' real argument is that the competition they face from cable modem service providers means that the ILECs lack market power in the residential markets. But this too is not a credible claim. To begin, the ILECs acknowledge that only one-third of the nation's households have access to both DSL and cable modem service.³¹ Other commenters report similar conclusions about the spotty nature of residential broadband competition. For example, California states that "one-third of all Californians live in cities where DSL service is the

²⁹Broadband Fact Report at 13.

³⁰Opening Comments at 34-35. The record in the Triennial proceeding also contains uncontroverted evidence that wireless and satellite networks are ill-suited to provide broadband alternatives. Most wireless networks generally do not have bandwidth anywhere near that of DSL. Most satellite services are also inadequate broadband substitutes because they are not two-way and, even for those that are two-way, the upstream speeds are prohibitively slow. Moreover, the delay associated with geostationary satellites prevents many applications from working properly and complicates or precludes the provision of both broadband and voice service. Further, entry costs are prohibitively expensive and performance is such that satellite broadband is at best an alternative suited mainly for customers in rural areas or other areas where no other broadband alternative is available. See, e.g., Triennial Comments of Covad, Joint Declaration of Anjali Joshi, Eric Moyer, Mark Richman, and Michael Zulevic at 8-11; HAI Report at 77-78.

³¹Broadband Fact Report at 15.

onlychoiceforbroadbandservice.”³²Thisisso,inpart,becausenotallcablesystems havebeenupgradedtoprovidecablemodemservice.Accordingly,e veni nthe residentialmarket,typicallythereisnotyetachoiceofeventwoproviders.

The larger point, which the ILECs decline to discuss, is that even if there were a duopoly in the residential market, in a duopoly market each of the providers retains significant market power. Because neither the ILECs nor their economists contest this fact, we simply refer the Commission to our opening comments.³³ The sum of the matter is that all residential transmission services, including those that carry broadband traffic, remains subject to the bottleneck control of service providers with market power.

The ILECs' claim that they own no bottleneck facilities used to provide broadband service to the *business* market is, if anything, even less plausible than their claims about the residential market. They correctly do not claim that cable providers offer any meaningful competition in the business markets. Instead, they point out that the interexchange carriers control most retail broadband business in the business markets, no doubt because that business requires interLATA services that the BOCs, until recently, were unable to provide.³⁴ What they fail to mention is that the overwhelming majority of broadband connections between the IXCs and their end user customers are accomplished with facilities leased from the ILECs pursuant to regulation the ILECs would have

³² CommentsofthePeopleoftheStateofCaliforniaandtheCaliforniaPublicUtilities CommissioninTriennialProceedingat12.

³³ OpeningCommentsat37 -38.

³⁴ SeeSBCCComments2 3;VerizonCommentsat16.

eliminated.³⁵In other words, the competition the ILECs assert justifies deregulation depends entirely on the regulation they would have the Commission abandon.³⁶ This is a frivolous argument.

In fact it is worse than a frivolous argument. WorldCom and other CLECs have invested extraordinary amounts of money in local network facilities based on the assurance that they would be able to purchase from the ILECs connections from those facilities to their customers. Yet the overwhelming majority of WorldCom's facilities - based business customers are connected to WorldCom's network by lines leased from the ILECs, and for virtually everyone of those customers, the ILEC is the sole carrier that owns facilities that connect those customers to WorldCom's network.³⁷ Virtually all of those facilities are capable of carrying "broadband" traffic - typically they are T-1 lines operated with DSL-based technology. If WorldCom were unable to lease these "broadband" loop facilities from the ILECs, it most certainly would not have made the

³⁵ See Comments of WorldCom In Triennial Review Proceeding CC Docket No. 01-338 *etal.* (FCC filed April 4, 2002), Declaration of Peter Reynolds ¶7.

³⁶ Qwest is alone among the ILECs in arguing that the Act's unbundling obligations continue to apply to ILEC transmission facilities when CLECs request them to provide telecommunication services. It goes on to argue that the intramodal competition permitted by the Act's unbundling rules is sufficient to permit relaxation of the *Computer* rules. Qwest Comments at 10, 23. We agree that competition in upstream markets permit deregulation of downstream markets. Unfortunately, the Commission notably has heretofore *declined* to order the unbundling of advanced services equipment necessary to provide advanced services, even while acknowledging CLECs are impaired without access to those facilities in their ability to offer advanced services. And Qwest itself correctly notes that the ability of CLECs to provide robust intramodal competition turns on the outcome of the *Triennial Review* proceeding, where Qwest has proposed even more restrictive leasing rules than those currently in place. See *id.* at 10. Until the Commission adopts and enforces unbundling rules adequate to assure vibrant intramodal competition, ISPs will continue to need the protection of the *Computer Inquiry* rules.

³⁷ See *supra* n. 35.

investment in its network. Just as Congress contemplated, access to ILEC facilities thus has directly led to investment in CLEC facilities. If WorldCom loses the ability to obtain transmission from its network to its customers, much of its investment will be stranded. Absent regulation, this is hardly some abstract risk. The BOCs are increasingly winning authority under section 271 to compete with other carriers for the full range of telecommunications services, and they have every incentive to deny their competitors access to the end users. These incentives do not change by labeling the access “broadband.”

While the Commission is powerfully concerned about ILEC incentives, ILEC investment and the risks of stranded ILEC facilities, it seems entirely unconcerned about the competitive market that has been born in the wake of the 1996 Act, and how regulatory change might affect the ILECs’ competitors. It has departed from its sound prior understanding of Congressional intent (and of sound economics) that its regulation should promote and protect *competition*, not specific *competitors*.³⁸

As we demonstrated in our opening comments, the ILECs’ ability to exercise market power in the markets for high-speed Internet access services is evident both in their pricing behavior,³⁹ and in their ability to leverage their monopoly power onto the downstream market for ISP services.⁴⁰ In their comments, the ILECs have nothing to say on the first point, and make the remarkable assertion that precisely because the market for

³⁸ *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, ¶¶ 618, 705 (1996).

³⁹ Opening Comments at 38.

⁴⁰ *Id.* at 37-38.

underlyingbroadbandtransmissionfacilitiesisopen,theyhavetothecontraryfreely
sharedtheirfacilitieswithabroadrangeofISPs.⁴¹

Thatclaimisdemonstrablyfalse.Thus,whileSBCtrumpetsthatit“currently
doesbusinesswithhundredsofISPs,”⁴²thatistrue(iftrueatall)onlyinthenarrowband
market,wheretheCommission’s *ComputerInquiry* ruleshaveforcedSBCtoacceptsuch
business.Inothercontexts,SBCbragsthatinthebroadbandmarket,wherethe
Commissionhasnotadoptedmeaningfulrules,fully80%ofitsDSLlinesareassignedto
itsownISP.⁴³TheotherILECsifanythinghavebeenevenmoresuccessfulatleveraging
theirmonopolypowertodestroycompetitionamongbroadbandISPs.⁴⁴Indeed,the
vehemencewithwhichtheILECsopposethe *ComputerInquiry* rulesisbyitself
powerfulevidencethattherulesarestillneeded –iftheILECsreallydidlackmarket
powerandwere forcedbycompetitivepressurestoopentheirfacilitiestodownstream
competition,theywouldnotsostronglyopposearulethatdoeslittlemorethanrequire
openaccessthatacompetitivemarketplacewouldinsistupon.

ThebestevidenceoftheILEC’sabilitytodestroycompetitionamongISPsabsent
regulationcomesfromtheISPs.Ifthe *ComputerInquiry* rulesdidnothingmorethan
impedecreativecooperativearrangementsbetweenILECsandISPs,theoverwhelming
majorityofISPswouldbejoiningtheILECs inurgingtheabandonmentofthoserules.
ButtheISPs(andtheircustomers)insteadvirtuallyuniformlyhavesubmittedComments
statingthattheadoptionoftheCommission’sproposal“wouldbethedeathknellfor

⁴¹VerizonCommentsat25;SBCCommentsat28.

⁴²SBCCommentsat28

⁴³ SeeOpeningCommentsat27&n.78.

⁴⁴ *Id.*at27n.79.

broadbandcompetitioninthiscountry. ”⁴⁵Whenthe largestindependentISPsinthe countryaremakingsuchstatements,theCommissionoughttosetasideitsideological preconceptionslongenoughtolisten,especiallywhenthatsentimentisechoedby virtuallyeveryotherISPcommenter. ⁴⁶

⁴⁵EarthlinkCommentsat27.

⁴⁶ See, e.g., CommentsofAOLTimeWarnerInc.at27(“Theinformationservice industryandtheAmericanpublicwouldsufferacutely,...iftheCommissionwereto abandonefficientandspecificaccessrulestowirelinebroadbandservices.”); *id.* at20 -21 (“ISPshavebuilttheirbusinessesinlegitimaterelianceonaccesstowireline infrastructure”); CommentsofOhioInternetServiceProvidersAssociation *etal.* at2 (“The *NPRM* raisestheseriouspossibilitythattheCommissionfavorstheeliminationof TitleIIrequirementsforsomeorallbroadbandtransmissioncapabilitydeployedby wirelinecarriers.Sucharulingcouldseriouslyharmtheavailabilityoftheseessential facilitiestocompetingISPs.”); *id.* at5(“PermittingILECstodiscriminateinfavorof theirownISPoperationstoany significantextentwouldallowtheILECstoextendtheir monopolycontrolofthelooptotheunregulatedinformationservicesmarket,aresultthat theCommissionhasfor25yearssoughtsuccessfullytoavoid.”); Commentsofthe CaliforniaInternetServiceProvidersAssociationat13(“[A]napparentpossibleoutcome ofthisproceedingisthatILECbroadbandcapabilitywouldbederegulatedbydefiningit asaninformationservice,andremovingitfromTitleIIoversight.Atthesametime,the Commissionmighteliminate *ComputerInquiry* unbundlingobligationsandother safeguardsagainstdiscrimination.Itishardtoimagineamorealarmingprospectto independentISPs.”); *id.* at18(“absentregulation,ILECscanengageinsystematic discriminationagainstISPs,and,asdiscussedherein,arecontinuallyattemptingtodoso evenundercurrentsafeguards”); CommentsoftheAmericanISPAssociationat1 -2(“the BellmonopolieshavesuccessfullylockedAmerica’sISPsoutofthebroadbandportion ofthenation’spublicphonenetworksbya combination ofpricingandprovisioning discrimination....ThisdiscriminationwhichwasmeanttobecheckedbytheFCC regulationscontainedintheComputerInquiry,specificallyComputerII –regulations that havebeenignoredandunenforcedbytheFCC –hasshapedthebroadbandmarketthat weseetoday,wheretheBellsholdamarketshareinDSLthatmirrorstheirmarketshare inlocalphoneservice.”); *id.* at8(“Aswehaveseen,theindependentISPshasbeen consignedtoanarrowbandghettothroughtheunchecked discriminationoftheBells. Freedfromanyregulatoryscrutinywhatsoeverandnolongerobligatedtosellaccessto theDSLportionofthepublicphonenetwork,doesanyoneseriouslybelievethatthe BellswillcontinuetoselltoISPs?”); CommentsofEarthlink,Inc.at3(“Aneffortbythe FCCtoderegulatewholesaleDSLtransmissionservicewouldenableDSLcarriersto discriminateamongISPs,refusingtoprovideDSLaccessto independentISPswhile offeringfavorabletermsforsuchservicetotheirown affiliatedISPs,therebyincreasing

Ironically, the real decision the Commission faces based on the comments it has received is one that it has all but ignored for eighty years. The Commission must address the remand of its *Computer III* rules. In so doing, the Commission must determine whether there are any conduct-based rules that provide independent ISPs with sufficient protection from ILEC discrimination. Without such rules, the Commission must reactivate *Computer II*'s structural separation requirements. Both approaches are supported by independent ISPs in this proceeding.

For example, the Ohio Internet Service Providers Association *et.al.* recommend that the Commission consider imposing the following requirements on the BOCs: complete structural separation between wholesale and retail operations; publication of all agreements with BOC-affiliated ISPs; reporting requirements, including performance metrics on installation intervals; enforcement of existing joint marketing safeguards and implementation of additional safeguards to ensure equitable marketing opportunities; and non-discriminatory access to BOC ordering and billing systems.⁴⁷ The California Internet Service Providers Association recommends that the Commission retain and strengthen its *Computer III* safeguards.⁴⁸ Earthlink proposes that the Commission update its *Computer Inquiry* rules and adopt a comprehensive five-point approach to broadband access for ISPs.⁴⁹ AOL Time Warner agrees that the *Computer III* safeguards have proved ineffective and need updating, and makes similar recommendations, focusing on

market share until all DSL broadband Internet access customers were served by carrier-affiliated ISPs.”); Direct TV Broadband, Inc. Comments at 11-12.

⁴⁷ Comments of the Ohio Internet Service Providers Association *et.al.* at 48.

⁴⁸ Comments of the California Internet Service Providers Association at 39.

⁴⁹ Comments of Earthlink, Inc. at 31.

theneedforeffectiveenforcementmechanisms.⁵⁰WorldCombelievesthatincreased regulationisnecessary,andthatinanycase,deregulationofthetransmissioncapabilities ofdominantcarriersmakesnosenseatall.

Ifmoresupportwereneededforthe propositionthatwhatisrequiredis *more*, not *less*, regulationofILECbottleneckfacilities,itcomesfromthestates.Thestate commentersuniformlysupportmaintainingTitleIIcommoncarriageregulationofILEC transmissionservices anddonotbelievetheNoticeincludessufficientlegalsupportfor departurefromtheCommission'slongstandingpolicy.Thestatesrecognizethatsince theILECsexercisecontroloverlastmiletransmissionfacilities,withoutaccesstothose facilities,independentISPsandCLECswillnotbeabletocontinuetheirservice offerings,whichwillresultinlessconsumerchoiceandinnovation.

NewYorkandMinnesotainparticularbothagreethatDSLInternetaccess serviceconsistsoftwodistinctcomponents:telecommunicationsserviceandinformation service.⁵¹Similarly,astheCaliforniaCommissionpointsout,justbecausetheILECs bundletransmissionserviceswithinformationservicesdoesnotchangethefactthatthe transmissionserviceiscommoncarriage.⁵²Likewise,MichiganandFloridaurgethe CommissiontomaintaintheexistingTitleIIrules.⁵³Finally,Illinois,Oregonand Vermontmakeclearthatchangingtheregulatorytreatmentofbroadbandtransmission

⁵⁰CommentsofAOLTimeWarnerat25 -34.

⁵¹NYPSCCommentsat3;MinnesotaCommentsat3.

⁵²CAPUCCommentsat4,9.

⁵³MIPSCComments;FL PSCComments.

serviceswillharmcompetitionandundetermine the market -openingprovisions of the 1996 Act.⁵⁴

Most of the states believe that the Notice's tentative conclusions are inconsistent with the FCC's own precedent and depart from its long -standing approach to regulation.⁵⁵ Thus, the California Commission highlights the fact that on at least three occasions the FCC has told the D.C. Circuit Court of Appeals that advanced services qualify as common carrier "telecommunication services."⁵⁶ The Ohio Commission is correct that the FCC has failed to address the fact that DSL -based advanced services already have been considered "telecommunication services" under the Act.⁵⁷ The Minnesota Department of Commerce states:

Instead of carrying out the will of Congress, the FCC's proposed rules, despite recitations to the contrary, seem to reflect a deliberate policy shift which would undo the six years of work that has gone into the Act, and seriously undermine the Act's effective power going forward.⁵⁸

The states understand that the ILECs have the ability and incentive to discriminate against both ISP and CLEC competitors.⁵⁹ The Texas Commission believes that regulation is necessary to prevent anti -competitive behavior within the broadband market,⁶⁰ and the New York Commission rightly points out that if CLECs do not have access to ILEC facilities, they will not be able to compete in the provision of broadband

⁵⁴ ICC Comments at 4; Ohio Comments at 2; VTPSBC Comments.

⁵⁵ See, e.g., ICC Comments at 9 -10; VTPBSC Comments at 21 -26.

⁵⁶ CAPUC Comments at 19.

⁵⁷ Ohio Comments at 5 -17.

⁵⁸ Minnesota Comments at 1.

⁵⁹ CAPUC Comments at 31.

⁶⁰ Texas PUC Comments at 6.

accessservices.⁶¹Moreover,deregulationalongthelinesproposedbytheFCCinitiates
Noticewouldstifleinnovationandtechnicalchange⁶²andallowtheILECsto dominate
content.⁶³Thereisbroadagreementamongthestatesthatreclassificationofwireline
broadbandserviceswillresultindecreasedbroadbandcompetition.⁶⁴

Againstallofthis,andpinnedinbytheirinsupportableclaimsthattheyare
welcomingbroadbandISPcompetitionwithopenarms,theILECshaveadifficulttime
explainingtheirhostilitytothe *ComputerInquiry* rules.SBCclaims mysteriouslythat
“novelarrangements”withISPsare“problematic”under *ComputerInquiry* rules,⁶⁵butit
declinestoexplainwhatthese arrangementsareorwhytheyareproblematic.Nothingin
the *ComputerInquiry* rulespreventstheILECsfromenteringintospecialized
arrangements,nomatterhow“novel.”AsQwestacknowledges,italways hasbeenable
toofferindi vidualizedarrangementstoits sophisticatedbusinesscustomersconsistent
withitsstatutoryobligationtotariffsuchofferings.⁶⁶Althoughitaskstoberelievedof
itscommoncarrierresponsibilities,Qwestissilentastowhatpurposewouldbeserved
bythischangeinregulatoryapproach.Theonlybenefititisableto identifyisthatthe
changewouldgivetheCommissionanopportunitypubliclyto declareitsfaithinthe
market.⁶⁷Butwhiletheologiansdisputethebenefitsofpublicprotestationsof faith,that

⁶¹NYPSCCommentsat1.

⁶²ICCCCommentsat26.

⁶³VTPSBat4.

⁶⁴ See, e.g., OhioCommentsat29.

⁶⁵SBCCCommentsat25.

⁶⁶QwestCommentsat15 -16.

⁶⁷ *Id.*

is as I have relied upon which to hang an argument that bedrock regulatory principles should be abandoned.

More generally, the ILECs complain that “regulatory burdens limit their network and service design decisions,”⁶⁸ but they fail to provide a single example of a network or service design decision so burdened. Obviously, a rule that merely requires the ILECs to do what they profess to be doing already as a result of competitive pressures imposes no undue burdens on the ILECs. SBC seems to suggest that there are technical limits to its ability to comply with the rules, since it offers “services that fuse transmission and computer processing functionalities in ways that make it difficult, if not impossible to unbundle pure transmission service.” Once again, however, SBC fails to identify a single service that has in fact rendered the *Computer Inquiry* rules unworkable.

The truth is that the ILECs have been under an obligation consistently for over 15 years that all new network deployment and investment is to be made consistent with Open Network Architecture principles. The Commission has been convinced that BOCs could design their “basic networks to satisfy Open Network Architecture requirements that are self-enforcing.”⁶⁹ Nothing presented by the ILECs in that proceeding or in this one supports a contrary conclusion. Disparaging the requirements of the 1996 Act and the *Computer Inquiry* rules as “onerous, unnecessary and counterproductive”⁷⁰ is no

⁶⁸SBCC Comments at 13.

⁶⁹ *In re Amendment of Section 64.702 of the Commission’s Rules and Regulations*, 104 F.C.C.2d 958, ¶211 (1986); see also, e.g., *In re Filing and Review of Open Network Architecture Plans*, 4 F.C.C.R. 1, ¶14 (1988) (“ONA...should promote efficient use of the network”).

⁷⁰Verizon Comments at 32.

substituteforpresentationofevidencethatthis isso.TheILECclaimsofregulatory burdenarenothingbuthotair.

II. TheILECs’ClaimThatWholesaleRegulationDetersTheirInvestmentin NewFacilitiesIsanImpermissibleandBaselessAttackonThis Commission’sTELRICRules.

Because the ILECs have little substantial to say about the supposed need to deregulate access to *existing* facilities, much of their advocacy focuses on the alleged consumer demand for services that can be offered only through yet -to-be-built fiber -to-the-curb facilities. They claim that their ability to meet this demand has been fatally undermined by regulation that deters ILEC investment in such new and speculative lines of business.

As we said in our opening comments, there is no evidence that there is unmet consumer demand for services that require “fiber to the curb” facilities, and no evidence that even in a totally unregulated market the ILECs would make the substantial investment required to provide these services. For all it appears, ILEC claims that regulation prevents them from building such facilities merely are a way to allow them to argue against critically needed regulation of their existing copper last mile network.

Leaving that to one side, their argument that regulation discourages speculative investment turns out to be little more than an impermissible collateral attack on the Commission’s TELRIC rules, an attack that mirrors their direct attack on those rules that was just recently resoundingly rejected by the United States Supreme Court by a 7 -1 majority in *IUBII*.

Thus, the gist of the ILECs’ complaint is that “wholesale regulations allow competitive local exchange carriers to free -ride on telephone company investment at

artificially low rates.... Furthermore, regardless of whether new offerings are successful, the telephone companies have to make the underlying facilities available to competitive local carriers at rock-bottom prices. This disparate treatment of investment successes and failures undermines the incentive to undertake costly and risky investments in innovation.”⁷¹

The Supreme Court has now squarely rejected these arguments, agreeing with this Commission that “TELRIC does not assume a perfectly efficient wholesale market or one that is likely to resemble perfection in any foreseeable ‘time’,”⁷² and so does not discourage investment in new facilities by either ILECs or CLECs by underestimating the cost of building facilities. The Court concluded that the claim that TELRIC deters ILEC investment is both theoretically unsound and “found on fact,” affirming “the commonsense conclusion that so long as TELRIC brings about some competition, the [ILECs] will continue to have incentives to invest and to improve their services to hold onto their existing customer base.”⁷³

The Court concluded that the ILECs’ quarrel ultimately was not with the FCC, but with the Congress, which unequivocally directed the FCC to devise a rate methodology “designed to give aspiring competitor some incentive to enter local retail telephony markets, short of confiscating the incumbents’ property.”⁷⁴ And, the Court

⁷¹ Verizon Comments at 19. See also, e.g., BellSouth Comments at 5 (“[u]nbundling of ILEC facilities and giving them away at TELRIC-based prices without any profit incentive will assure very limited deployment”); Kahn/Tardiff Declaration attached to Verizon Comments ¶¶ 29–30 (criticizing TELRIC).

⁷² *IUBII*, 122 S.Ct. at 1669.

⁷³ *Id.* at 1676 n.33.

⁷⁴ *Id.* at 1661.

found that the “[m]ost important of all” of the attributes of TELRIC is the very one about which the ILECs complain here: the requirement that cost be measured based on the most efficient technology and the lowest cost network configuration. ⁷⁵

As to the oft-repeated claims of the discredited ILEC economists that TELRIC does not properly price speculative investment –claims that feature prominently in the ILEC comments here ⁷⁶ –the Supreme Court concluded that a “basic weakness” of this argument is that it was based on a fundamental misunderstanding of TELRIC, since “[TELRIC] rates leave plenty of room for differences in the appropriate depreciation rates and risk-adjusted capital costs depending on the nature and technology of the specific element to be priced.” ⁷⁷

In sum, the Supreme Court has concluded that Congress expressed a “clear intent” ⁷⁸ to adopt a pricing methodology that does exactly what the ILECs here complain about: promote the sharing of ILEC facilities to provide competitive services. And it has definitively concluded that TELRIC does *not* have the deleterious consequences that the ILECs here assert. Congress made it national telecommunications policy to aggressively promote competition (including competition making use of shared facilities) as the most sensible way to maximize social welfare. The FCC has no authority to adopt the contrary view that the best way to promote social welfare is to preserve ILEC monopoly rents as a way to encourage them to make speculative investments. The ILECs’ arguments based on mischaracterization of TELRIC and the supposed benefits of a deregulated

⁷⁵ *Id.* at 1664.

⁷⁶ *See, e.g.,* Verizon Comments at 21 & n.44 (citing Kahn).

⁷⁷ 122 S.Ct. at 1651.

⁷⁸ *Id.* at 1668 n.20.

monopoly have always been baseless. Now they have been definitively legally foreclosed.

III. The ILECs' Claim That It Is Bad Policy and Unlawful to Subject Them to Different Regulation Than Cable Operators Is Entirely Without Merit.

Finally, the ILECs claim it is both unwise and illegal to impose common carrier burdens on their broadband facilities and services when the cable companies' facilities and services are subject only to the Commission's Title I regulation. They are wrong on both counts.

A. The Commission's Decision to Decline to Impose New Title II Regulation Upon Cable Broadband Providers Does Not Require That Wireline Broadband Providers Be Relieved of Their Preexisting Title II Obligations.

The ILECs insist that since the cable operators have more residential broadband customers than they do, it makes no sense to impose common carrier regulation on them but not on the cable companies.⁷⁹ But since the FCC has chosen for the time being to decline to treat cable companies as common carriers, it is now more critical than ever that the FCC continue to require the ILECs to live up to their common carrier responsibilities. They remain the only companies that provide last-mile connectivity to every home and business in the country, and there are overriding public policy justifications for mandating open access to those facilities.

Regulatory parity is a laudable goal, but it does not trump all other considerations. If the FCC were to rule that no carriers controlling high bandwidth transmission facilities had obligations to share those facilities with providers of downstream services, the result would be the owners of those transmission facilities—cable and wireline alike—would

⁷⁹ See, e.g., Verizon Comments at 23-30; SBCC Comments at 18-21.

leverage their control over those facilities on to downstream markets, putting the competitive status of those markets at risk, and greatly harming consumers.⁸⁰ That prospect is a far greater threat to First Amendment values than the interests invoked in the frivolous constitutional claims offered by Verizon.⁸¹ On the other hand, if the FCC enforces the *Computer II* rules that have always applied to wireline carriers and allows ISPs access to ILEC broadband facilities, such regulation is likely to have the beneficial effect of creating competitive pressures that will also force the cable owner to provide competing open access. It may indeed have been preferable to impose regulatory obligations equally upon both sets of carriers; but applying them on one is greatly preferable to abandoning common carriage principles altogether.

While subjecting the ILECs to continuing common carrier regulation will result in great consumer benefits for both ILECs and cable customers, there are no substantiated harms from subjecting the ILECs to asymmetrical treatment. Qwest and the other ILECs bluster that the burdens on them are so great that they will leave the broadband market rather than continue to live under the *Computer* regime.⁸² The Commission would be well advised to refuse to give into such BOC blackmail, even if there were a grain of truth to the threat. In any event, these are idle threats. While they of course would prefer to exercise market power free of regulation, as we just observed, the ILECs fail to come up with a single concrete example of the way in which they would be hurt by these rules, and their conduct speaks louder than their words. Spurred by cable and data CLECs

⁸⁰ Opening Comments at 24 -32.

⁸¹ See *infra* nn. 87 -95 and accompanying text.

⁸² Qwest Comments at 2.

deployment, the ILECs have been actively deploying facilities to provide Internet access services, notwithstanding the alleged “burdens” imposed by the current regulatory regime. The ILECs’ ubiquitous loop plant is their most valuable asset. As shown by their actions, they have powerful incentive to upgrade that plant to respond to competitive pressures. As Vint Cerf has said, he is “genuinely puzzled by the notion that the local telephone companies need any additional incentive to deploy broadband services, [since] competition is its own incentive.”⁸³ The real risk to “broadband” deployment would come by granting the ILECs the unrestrained ability to exercise their market power. In that regard, the Commission should keep in mind the litany of services promised by the ILECs in the past if only certain regulatory concessions were granted, services that never materialized.

Neither is it entirely irrational to maintain the status quo, in which cable facilities have never been treated as common carrier facilities, while wireline facilities always have. There are clear regulatory and technical differences between the cable and wireline services. The two kinds of service are subject to entirely different regulatory regimes, imposed by entirely different sets of regulators. ILEC claims that they are subject to more regulation than cable operators simply ignore the different regulations imposed on cable operators.

It is no answer that the only relevant regulations are those imposed on “broadband services,” however they are defined. Companies have a powerful incentive to fully exploit the capabilities of their transmission networks. It makes no sense to consider in isolation one particular set of “broadband” uses, especially when virtually every

⁸³Cerf Letter at 4.

conceivable telecommunications, information and video service is carried over “broadband” facilities. In this way as well, talk of “incentive to deploy broadband” is inherently misleading.

Additionally, the ILECs have traditionally provided transmission services, including transmission services to enhance or information service providers. Their network, by practice as well as by regulation, has traditionally been open to customers who wished to use it to transmit information. In contrast, “[the Commission is] not aware of any cable modem service provider that has made a stand-alone offering of transmission for a feed directly to the public,” and “there is no Commission requirement that such an offering be made.”⁸⁴ While Qwest overstates matters when it asserts that the question whether a service should be considered common carrier service turns on the question whether it has always been treated as such a service,⁸⁵ it is correct that historical treatment is relevant, and cable and wireline providers have entirely different regulatory histories.

As a result of these different histories, while the telephone network was built to provide access to an unlimited number of enhanced service providers and voice customers alike, cable systems have traditionally been enclosed, used to carry only the cable companies’ video services. Accordingly, unlike wireline facilities, in a cable system, the FCC has concluded, “the multiple-ISP environment requires a rethinking of many technical, operational and financial issues, including implementation of routing

⁸⁴ *In re Inquiry Concerning High-Speed Access on the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, ¶40 (2002) (“*Cable Declaratory Ruling*”).

⁸⁵ Qwest Comments at 15.

techniques to accommodate multiple ISPs.”⁸⁶ Whatever the merit of that conclusion, it was an important predicate to the Commission’s cable ruling, and it does not apply here. No “re-thinking” is required to maintain the status quo on the wireline side. The ILECs’ claim that there are no relevant distinctions here has been rejected by the Commission in its *Cable Declaratory Ruling*.

In sum, there are compelling reasons to continue to subject wireline broadband service providers as common carriers, regardless of how providers of cable modem service are categorized. Indeed, the decision not to subject cable operators to Title II regulation makes the case for maintaining the status quo for wireline carriers even more compelling.

B. Asymmetrical Regulation of Cable and Wireline Carriers Does Not Violate the First Amendment.

Like its policy-based claims, Verizon’s⁸⁷ strained constitutional argument for deregulating wireline carriers’ broadband service is wholly unavailing. Verizon offers no legitimate basis for claiming that the continued regulation of wireline carriers under Title II raises any serious First Amendment concerns.

Even if passive broadband transmissions somehow transformed service providers into First Amendment “speakers,” the “one-sided burdens” on telephone companies purportedly imposed by “the present regulatory regime,” which has been in place for over 20 years,⁸⁸ simply has never threatened any constitutional interests. The Supreme Court

⁸⁶ *Cable Declaratory Ruling* ¶29.

⁸⁷ That Verizon is the sole Commenter raising any First Amendment concerns illustrates how far-fetched this argument truly is.

⁸⁸ See Verizon Comments at 27.

has made clear that an asymmetrical burden on First Amendment speakers is not constitutionally suspect where, as here, it does not “threaten[] to suppress the expression of particular ideas or viewpoints.”⁸⁹ Current regulation of wireline carriers indisputably places no content or viewpoint limitations on the transmission of broadband service; indeed, telephone companies like Verizon can transmit precisely the same broadband content and services as cable companies regulated under Title I.⁹⁰ In addition, unlike them must carry provisions upheld in *Turner*,⁹¹ the supposed “burden” of the present regulatory regime – including the common carrier and unbundling requirements – creates absolutely no interference with the editorial discretion of wireline broadband providers.⁹² At most, such regulations need satisfy only rational basis scrutiny,⁹³ a burden the current common carrier obligations surely meet.⁹⁴

⁸⁹ *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

⁹⁰ In fact, the Act’s definition of “telecommunications,” which plainly applies to the provision of stand-alone broadband transmission, *see* Verizon Comments at 9, involves the transmission of information “in the form or content of the information sent and received.” 47 U.S.C. § 153(43).

⁹¹ *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997).

⁹² *Bell South Corp. v. FCC*, 144 F.3d 58 (D.C. Cir. 1998), cited in Verizon Comments at 28 n.66, is similarly inapposite. *Bell South* concerned a challenge to a provision of the Telecommunications Act limiting the content of information Bell operating companies can provide. *See* 144 F.3d at 60 (rejecting challenge to Section 274 of Act, which limits the ability of Bell operating companies to provide “electronic publishing,” a category that includes disseminating news articles, offering literary material, and providing services similar to the Lexis/Nexis and Westlaw databases).

⁹³ *See, e.g., Leathers*, 499 U.S. at 449–53 (applying rational basis scrutiny and concluding that extension of sales tax “to cable television services alone, or to cable and satellite services, while exempting the print media, does not violate the First Amendment”).

⁹⁴ Although rational basis scrutiny plainly would apply, continued regulation of wireline broadband service undoubtedly would survive intermediate scrutiny as well. Such regulation serves important interests similar to those recognized in *Turner* – for example, “promoting the widespread dissemination of information” and “promoting fair competition,” *see Turner Broad. Sys.*, 520 U.S. at 189 (quoting *Turner Broadcasting*

Verizon's constitutional argument against asymmetrical regulation of cable and wireline poses a sweeping challenge to the legal framework governing communications services in this country. Regulation of cable and wireline has always been asymmetrical. Cable service is licensed, regulated, and taxed by municipal governments; telecommunications, on the other hand, are regulated by federal and state agencies. Cable companies traditionally have not offered services to the public on a common-carrier basis; by contrast, local telephone companies historically have been required to offer their transmissions as a common-carrier service. Were it successful, Verizon's novel First Amendment challenge to differential broadband regulation would seriously undermine the reasonable asymmetry that pervades most communications regulation. ⁹⁵

IV. Commenters Agree That Several of the Commission's Proposed Constructions of the 1996 Act's Statutory Definitions Are Unlawful and Unwise.

A. DSL -Based Transmission Services Are "Telecommunications Services."

All commenters, including the ILECs, agree that stand-alone DSL-based transmission capability is "telecommunications," and has traditionally been viewed as a

System, Inc. v. FCC, 512 U.S. 622, 662 (1994)). And, because it does not interfere with any editorial decision making, wireline regulation burdens substantially less speech than the must-carry provisions upheld in *Turner*.

⁹⁵If anything, Verizon's argument against asymmetrical regulation falls more appropriately under the rubric of the Equal Protection clause. Verizon, however, wisely has chosen not to raise an Equal Protection claim, which, as Verizon's First Amendment argument, would be a frivolous exercise. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001) (noting that, where legislation does not regulate suspect or "quasi-suspect" classes, "such legislation incurs only the minimum 'rational basis' review applicable to general social and economic legislation"); *Vacco v. Quill*, 521 U.S. 791, 799 n.5 (1997) (same); *Gregory v. Ashcroft*, 501 U.S. 452, 470-71 (1991) ("In cases where a classification burdens neither a suspect group nor a fundamental interest, courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws.") (internal quotation marks and citation omitted).

“telecommunicationsservice.”⁹⁶ And, with the notable exception of the ILECs, all commenters agree that this stand-alone DSL-based telecommunication is a “telecommunicationsservice” when it is offered discretely to the public for a fee. Given that is the very definition of “communicationsservice,” the answer could hardly be otherwise.

Verizon and Qwest alone argue nevertheless that these communicationsservices should be treated as “private carriage” rather than “common carriage” services, and that accordingly they should not be categorized as “telecommunicationsservices.” They argue that the only reason they ever offered DSL-based transmissions services generally to the public was that they were required to as a result of “regulatory creep,” and that they should be allowed to withdraw their tariffs and begin to offer these particular telecommunicationsoffering only through private contractual arrangements.⁹⁷

In support of this claim, these ILECs make no argument based on the statutory text. Instead they offer the policy arguments that we have discussed in the preceding sections: arguments relating to their alleged lack of market power, their incentives, and the need for parity with the cable companies. We agree that an important part of the analysis of whether a service should be treated as a common carrierservice involves a policy judgment concerning the benefits of treating the service as common carriage, and agree as well that the ILECs’ ability to exercise market power with regard to the services provided over the facilities in question is an important consideration in making that

⁹⁶ See, e.g., SBCC comments at 17; Verizon Comments at 9; Qwest Comments 12-13; AT&T Comments at 13-15.

⁹⁷ See, e.g., Verizon Comments at 6-23.

policy judgment.⁹⁸ As we demonstrated above, however, Verizon and Qwest could not be more wrong in asserting they have no market power over broadband services. The loop facilities that provide broadband capability constitute classic bottleneck facilities that must be treated as common carrier facilities.

In addition, we make the following points:

First, even leaving the bottleneck nature of these facilities to one side, “common carriage” duties apply whenever “there are reasons simpliciter in the nature of [the service] to expect an indifferent holding out to the eligible user or public.”⁹⁹ Transmission services are quintessential common carrier services. They are not some artificial product offering that was the result of a perverse application of an antiquated rule. Instead these services are, as AT&T concluded in its comments, “generally demanded and used by large classes of customers, have no generally available substitutes, are used in substantial part to compete with incumbent LECs’ information services, have a range of other potential applications, and have always been generally offered on a common carrier basis.”¹⁰⁰ As AT&T also observed, the only situation in which the Commission ever has authorized ILECs to provide telecommunications as private carriage concerned a few extremely narrow “individual case basis” offerings where there was virtually no general demand for the services.¹⁰¹ As the ILECs are frank to acknowledge, they are asking for a radical change in the rules, without offering any justification that would support such a change.

⁹⁸ See Opening Comments at 62–63 (citing cases).

⁹⁹ *Nat’l Ass’n of Reg. Util. Comm’rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976).

¹⁰⁰ Comments of AT&T at 23.

¹⁰¹ *Id.*

Second, it is not the least bit clear what facilities the ILECs are arguing they should be entitled to now treat as “private carriage.” Any number of services can be offered over 2-wire and 4-wire copper pair loops that connect ILEC central offices to every home and business in the country: POTS, ISDN, T1-based voice and data services, ADSL-based services, and others all move over the same wires. Virtually all of these services are capable of delivering content at “broadband” speeds. Nor does it make any sense to say that voice services generally are not “broadband,” and data services are. T1 circuits can carry either voice and data, and a channelized T1 can carry both at the same time. Carriers that offer Internet telephony carry voice and data indistinguishably. A rule that states that copper facilities attached to ADSL modems are “private carriage” while the same copper facilities covering the same routes attached to SDSL modems are “common carriage” is impossible to defend.

Third, precisely because DSL-based transmission services are commonly used for transmission services with many practical applications, the ILECs are hardly the only carriers offering them. WorldCom for one offers DSL-based transmission services, and does so both for loop and for transport facilities.¹⁰² In particular, it sells high capacity broadband loops to ISPs, who combine them with their information services to sell information services to retail customers. Qwest’s answer to this problem for its theory is that the same service can be a common carrier service when provided by the CLECs, but private carriage when provided by the ILECs who actually own the underlying facilities.¹⁰³ This through-the-looking-glass view of “common carriage” shows only how

¹⁰² See Graham Decl. attached to Opening Comments, ¶¶ 43-47.

¹⁰³ Qwest Comments at 21.

farQwest's logic has departed from any sensible understanding of either the Act's definitions or common carrier principles. At least Verizon is clear about the consequences of its view, which it understands to be that "broadband transmission facilities" are for all purposes private carriage, and that the ILECs would be under no obligation to share those facilities with anyone for any reason.

In sum, the Commission has repeatedly and consistently maintained that DSL-based transmission services are telecommunications services.¹⁰⁴ Several ILECs' suggestion that it should reverse course because the facilities used to provide those services are no longer bottleneck facilities is wrong on the facts and wrong on the law.

B. ILECs That Provision Transmission Facilities To Their Own ISP Are Providing "Telecommunications Services."

Virtually all commenters agree with WorldCom that when a bottleneck carrier provides bottleneck facilities to itself, or to its ISP affiliate, it is providing a telecommunications service. Predictably, only the ILECs disagree. But while they are quick to point out that the Commission has generally understood that "by adding an information component to a telecom service, the entire service becomes an information service,"¹⁰⁵ they fail even to discuss the fact that the Commission has never applied that same principle to a carrier that uses its own bottleneck facilities to provide information services. Were it otherwise, the entire *Computer Inquiry* framework would be

¹⁰⁴ See Opening Comments at 58 n. 168.

¹⁰⁵ Verizon Comments at 8. Verizon here adopts the FCC's tentative conclusion that when an information service is added to a telecommunications service, the resulting service is contaminated and should be treated exclusively as an information service. It is in part that conclusion that extends the reach of this proceeding to apply to virtually all telecommunications services. As the Joint Commenters stated in their opening comments, the Commission should not extend its contamination doctrine to apply to monopoly local exchange carriers. See Opening Comments at 69 -72.

undermined,sincetheessenceofthe *ComputerInquiry* rulesisthattransmissionfacilities
be separated from informationservicesand subject to regulation. ¹⁰⁶

Similarly,whiletheILECsnotethattheCommission *generally*treatsinformation
servicesandtelecommunicationsservicesasmutuallyexclusivecategories,theyignore
thattheCommission *also*hasalw aystakenpainstostatethatwhenanILECself -
provisionstransmissionfacilitiestoitsownISP,it isatonceproviding *both*
telecommunicationsservices(toitself), *and*informationservices(totheenduser). ¹⁰⁷
SincetheILECschoosetoignorethesescl earlyarticulatedprinciplesratherthanto
disputethem,onthesematterswereston theshowingwemadeinouropening
submission.

V. The1996Act'sSection251RequirementsDoNotTurnonILECConduct.

Onceagain,onlytheILECsarguethatthestatutoryrequirementtoleasefacilities
turnsontheusestowhichtheyputthesefacilities,andnotevenalloftheILECsbelieve
thatthisargumentpassesthe“laughte st.”Qwestissurelycorrectthat,withrespectto
UNErigh tsundersection251(c)(3),“thequestioniswhethera *requestingparty* isa
‘telecommunicationscarrier,’andwhethertheservice *it* wishestoprovideusingtheUNE

¹⁰⁶ *Id.*; *InreIndep.DataCommunications Mfrs.Ass’n, Inc.*, 10F.C.C.R.13717, ¶52 (1995).

¹⁰⁷ *See* OpeningCommentsat60 -63.ManycommentersalsoagreewithWorldComthat,
inthealternative,Internetaccessserviceis *both*aninformationserviceanda
telecommunicationsservice,andthattheCo mmission’s“contamination”rulepursuantto
whichsuchmixedservicesaretreatedexclusivelyasinformationservices,doesnotapply
inthecaseofbottleneckfacilities -basedproviders. *See, e.g.*, DirectTVBroadband, Inc.
Commentsat20 -24.Indeed,giv enthattheILECspricetheirInternetaccessservicesat
approximatelythesamerateasthetransmissionservicesoverwhichthatinformation
serviceiscarried,evidentlytheyareoftheviewthatmostofthevalueinInternetaccess
serviceisinthe tr ansmissionprovided.

atissueisa‘telecommunicati onsservice.’”¹⁰⁸WhiletheotherILECsassertthatthe extentoftheirunbundlingobligationturnsontheuse *they*puttotheelement,theyfail entirelytodobusinesswiththestatutoryterms,whichplainlyindicateshatitisthe CLECs’intentions,not theILECs’,thatgovern.Aswedemonstratedinouropening comments,¹⁰⁹thecontraryviewisirreconcilablewiththestatutorytextorwithany plausibleunderstandingofstatutorypurpose.

CONCLUSION

Fortheforegoingreason s,theCommissionshouldconfirmthattheILECs must complywiththeirunbundlingandnondiscriminationobligationsunderboththe *ComputerInquiry* rulesandCongress’TitleIIrequirements,andshouldfindthat broadbandtransmissionservicesarecommonc arriertelecommunicationsservices whetherornottheILECisprovidingthoseservicestoitselfortoitsISPaffiliate.

¹⁰⁸QwestCommentsat21(emphasisinoriginal).

¹⁰⁹OpeningCommentsat72 -78.

Respectfullysubmitted,

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